**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**WASHINGTON, D.C.**

**MOTOR CITY PAWN BROKERS INC.,**
**THE AUBREY GROUP INC., AND**
**AUBREY BROTHERS, LLC**

**and** **Case 07-CA-179458**

**TERRANCE WALKER, an Individual**

**Charging Party Walker**

**and** **Case 07-CA-179461**

**PATRICIA TILMON, AN Individual**

**Charging Party Tilmon**

# CLAIMANTS PATRICIA TILMON, TERRENCE WALKER, AND GIANLUCA BARTOLUCCI'S BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

## INTRODUCTION

Claimants Patricia Tilmon, Terrence Walker, and Gianluca Bartolucci (collectively, "Claimants") have filed Exceptions to the Decision and Recommended Order ("Decision") of Administrative Law Judge Elizabeth M. Tafe ("ALJ") issued in these cases on October 22, 2018. Claimants take exception to legal conclusions of the ALJ that Respondent did not violate Section 8 of the National labor Relations Act ("NLRA") by: (1) including a provision in the Updated Employee Handbook regulating employee behavior outside of work; (2) including a provision in the Updated Employee Handbook regulating social media use; and (3) including a provision in the Updated Employee Handbook regulating the use of recording devices in the workplace. Claimants are otherwise in agreement with the ALJ's holdings in the Decision.

## STATEMENT OF FACTS

Respondent operates a pawn brokerage business in four locations in the Detroit metropolitan area. (Tr., at 34). Among Respondent's employees were Claimants Patricia Tilmon, Terrence Walker, and Gianluca Bartolucci, who worked for Respondent as pawn brokers. (Tr., at 39).

In about February 2016, Respondent provided its employees with a new set of employment documents and required employees to sign the documents in order to retain their employment. (Tr., at 48-49). These documents included an Updated Employee Handbook. (Tr., at 49-51). When Claimants Tilmon, Walker, and Bartolucci refused to sign the new employment documents, Respondent terminated their employment. (Tr., 26-27, 29, 96). The Updated Employee Handbook included provisions: (1) regulating employee behavior outside of work (Decision, p. 19:13-28); (2) regulating employee use of social media (Decision, p. 21:20-30); and (3) regulating the use of recording devices in the workplace (Decision, p. 22:25-39). On October 22, 2018, Administrative

Law Judge Elizabeth M. Tafe found that the preceding provisions did not violate Section 8 of the NLRA. (Decision., pp. 20:7-19, 22:12-20, 23:9-22).

## QUESTIONS PRESENTED

I. Does the provision of the Updated Employee Handbook regulating employee behavior outside of work violate Section 8 of the NLRA?

THE ALJ ANSWERED: "YES"

CLAIMANTS TILMON, WALKER, AND BARTOLUCCI ANSWER: "NO"

II. Does the provision of the Updated Employee Handbook regulating social media use violate Section 8 of the NLRA?

THE ALJ ANSWERED: "YES"

CLAIMANTS TILMON, WALKER, AND BARTOLUCCI ANSWER: "NO"

III. Do the no-recording rules in the Updated Employee Handbook violate Section 8 of the NLRA?

THE ALJ ANSWERED: "YES"

CLAIMANTS TILMON, WALKER, AND BARTOLUCCI ANSWER: "NO"

## ARGUMENT

### 1. The ALJ Incorrectly Holds at Page 20 of the Decision that the Provision of the Updated Employee Handbook Regulating Employee Behavior Outside of Work Does Not Violate Section 8 of the NLRA

The ALJ upheld the following provision in the Updated Employee Handbook regulating "Outside of Work Behavior":

> . . . Motor City Pawn Brokers may terminate workers engaging in criminal activity outside the workplace, when off-duty conduct reflects unfavorably on the employee, fellow employees and/or the Company generally, and when an employee's off-duty work activities are such as to create critical comment of the

> Company by the general public. Any slander of the Company, representing the Company or themselves as an employee in any negative or demeaning way will result in termination.
>
> This "Outside Work Behavior" Policy does not apply, and will not be enforced, in any manner that would restrict, infringe upon or otherwise limit employees' rights under the National Labor Relations Act, including without limitation the right to engage in concerted activities for the purpose of mutual aid and protection. The Company will enforce this Policy in accordance with all application international, national, country, federal, state and local laws.

(Decision, pp. 19:15-30, 20:7-19).

The ALJ found that this provision did not violate the NLRA because of the "proviso identifying that it will not be applied to 'restrict, infringe upon, or otherwise limit employees' rights under the National Labor Relations Act, including, without limitation the right to engage in concerted activities for the purpose of mutual aid and protection.'" (Decision, p. 20:10-13). The ALJ held "that this rule in the Updated Handbook, does not have a reasonable tendency to interfere with Section 7 rights, because the proviso advises employees that the rule will not be applied against employees' activities protected by the Act." (Decision, p. 20:13-19). The ALJ determined that this rule is a Category 2 Rule under *The Boeing Company*, 365 NLRB No. 154 (2017). (Decision, p. 20:21-22). "*Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." 365 NLRB No. 154, at 4 (emphasis in original).

Even employer rules with language stating that the rule will not be applied to prevent employees from engaging in protected activity are unlawful when the same rule prohibits activity protected by the NLRA. *Tower Industries Ind. d/b/a Allied Mechanical and United Steelworkers of America, AFL-CIO, CLC and Walter Reddoch and Kerry Wolken*, 349 NLRB 1077, 1084 (2007)

("Tower Industries"). In *Tower Industries*, the employer distributed a release with the following language:

> Upon signing this release and receipt of the consideration, I agree not to file or maintain a claim arising out of the subject matter covered under the Complaint described above. I further agree not to initiate, assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, whether the claims are brought on my behalf or on behalf of any other employee, unless required by a court order or valid subpoena or otherwise permitted by federal or state law including but not limited to the National Labor Relations Act.

349 NLRB 1077, at 1084. The employer argued that the fact that the provision stated "unless . . . permitted by federal . . . law including but not limited to the National Labor Relators Act" saved the release. *Id.* However, the ALJ disagreed, and the Board affirmed the decision.

The ALJ in *Tower Industries* held:

> Viewed from an employee's perspective, there is an obvious difference between the two conflicting portions of the release. The plain language of the first portion directly prohibits the signatory employee from assisting other employees in pursuing wage claims; the second portion cancels the first but only if the signatory employee is knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion. Respondent argues "It would take a highly paternalistic view of employees to presume they would not get that their NLRA rights are unaffected by the clause." That argument misses the point; employees may understand that their NLRA rights are unaffected, but may not know the fully [sic] panoply of those rights. An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general references [sic] to rights protected by law.

*Id.* The ALJ in *Tower Industries* acknowledged cases that the respondent relied upon that reached the opposite conclusion, but found that those cases did not mandate the opposite result because the other cases "involved rules that the Board could not reasonably be read by employees to restrict their rights under the Act." *Id. See also Trailmobile*, 221 NLRB 1088, 1089 (1975) (determining that an application of a policy "except as provided by law" was invalid because "an employer is not entitled to place upon its employees the burden of determining their legal rights in this manner."); *Fasco Indus. v. NLRB*, 412 F.2d 589, 590 (4th Cir. 1969) (invalidating a prohibition on

solicitation, despite inclusion of a clause "except as permitted by Federal and State statutes and applicable court decisions thereunder," because "an employee must have a high degree of legal sophistication to know precisely what is permitted by 'Federal and State statutes *and applicable court decisions thereunder*' in order to know what he may and what he may not do without fear of employer retribution) (emphasis in original).

Here, although the rule regulating outside of work behavior contains a provision stating that the rule does not apply in a way that impacts employees' rights under the NLRA, this does not save the Outside of Work Behavior rule from being unlawful. The ALJ held that the rule was lawful only because "in context, this proviso saves the otherwise overly broad terms of the provision by explaining to employees specific limits to the overly broad rules." (Decision, p. 20:13-15). This decision directly contravenes NLRB decisions finding that a rule that prohibits activity protected under Section 7 cannot be saved by a provision stating that the rule does not apply to interfere with employees' rights under the NLRA. *See Tower Industries*, 349 NLRB at 1084; *Trailmobile*, 221 NLRB at 1089; *Fasco Indus.* 412 F.2d at 590. Accordingly, Claimants request that the Board find this provision unlawful in that it has a reasonable tendency to interfere with Section 7 rights.

**2. The ALJ Incorrectly Holds at Page 22 of the Decision that the Provision of the Updated Employee Handbook Regulating Social Media Use Does Not Violate Section 8 of the NLRA**

The ALJ incorrectly holds at page 22 of the Decision that the provision of the Updated Employee Handbook explaining when social media use is acceptable does not violate the NLRA. The Handbook stated,

> <u>Social Media is acceptable if it:</u>
> 1. Is permitted because of a protected legal right; or
> 2. Has been approved in writing by the Company; or

3. Contains information consistent with the Company's website and published materials; or
4. Clearly identifies that an employee is not acting on behalf of the Company.

. . .

(Decision, p. 21:20-29).

In evaluating this provision, the ALJ held:

> I find that the provision of the Updated Handbook rule explaining when social media is acceptable does not violate the Act, because the first item listed in the provision clearly states that social media is acceptable when 'permitted because of a protected legal right.' When read in context, employees would reasonably understand that the limitations alleged to be unlawful, which follow the first item and are listed in the disjunctive (i.e., "or"), are additional ways that social media would be acceptable to the Respondent, not overly broad rules interfering with their protected right to communicate about terms and conditions of employment.

(Decision, p. 22:12-18).

The ALJ found that this provision did not violate the NLRA because of the "proviso identifying that it will not be applied to 'restrict, infringe upon, or otherwise limit employees' rights under the National Labor Relations Act, including, without limitation the right to engage in concerted activities for the purpose of mutual aid and protection.'" (Decision, p. 20:10-13). The ALJ held "that this rule in the Updated Handbook, does not have a reasonable tendency to interfere with Section 7 rights, because the proviso advises employees that the rule will not be applied against employees' activities protected by the Act." (Decision, p. 20:13-19). The ALJ determined that this rule is a Category 2 Rule under *The Boeing Company*, 365 NLRB No. 154 (2017). (Decision, p. 20:21-22). Category 2 rules "include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *The Boeing Company,* 365 NLRB No. 154, at 4.

Even employer rules with language stating that the rule will not be applied to prevent employees from engaging in protected activity are unlawful when the same rule prohibits activity protected by the NLRA. *Tower Industries*, 349 NLRB at 1084 (2007). In *Tower Industries*, the employer distributed a release with the following language:

> Upon signing this release and receipt of the consideration, I agree not to file or maintain a claim arising out of the subject matter covered under the Complaint described above. I further agree not to initiate, assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims, including penalties, fees and costs, whether the claims are brought on my behalf or on behalf of any other employee, unless required by a court order or valid subpoena or otherwise permitted by federal or state law including but not limited to the National Labor Relations Act.

349 NLRB 1077, at 1084. The employer argued that the fact that the provision stated "unless . . . otherwise permitted by federal . . . law including but not limited to the National Labor Relators Act" saved the release. *Id.* However, the ALJ disagreed, and the Board affirmed the decision.

The ALJ in *Tower Industries* held:

> Viewed from an employee's perspective, there is an obvious difference between the two conflicting portions of the release. The plain language of the first portion directly prohibits the signatory employee from assisting other employees in pursuing wage claims; the second portion cancels the first but only if the signatory employee is knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion. Respondent argues "It would take a highly paternalistic view of employees to presume they would not get that their NLRA rights are unaffected by the clause." That argument misses the point; employees may understand that their NLRA rights are unaffected, but may not know the fully [sic] panoply of those rights. An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general references [sic] to rights protected by law.

*Id.* The ALJ in *Tower Industries* acknowledged cases that the respondent relied upon that reached the opposite conclusion, but found that those cases did not mandate the opposite result because the other cases "involved rules that the Board could not reasonably be read by employees to restrict their rights under the Act." *Id. See also Trailmobile*, 221 NLRB at 1089 (determining that an application of a policy "except as provided by law" was invalid because "an employer is not

entitled to place upon its employees the burden of determining their legal rights in this manner."); *Fasco Indus.*, 412 F.2d at 590 (invalidating a prohibition on solicitation, despite inclusion of a clause "except as permitted by Federal and State statutes and applicable court decisions thereunder," because "an employee must have a high degree of legal sophistication to know precisely what is permitted by 'Federal and State statutes *and applicable court decisions thereunder*' in order to know what he may and what he may not do without fear of employer retribution).

Here, although the rule regulating the use of social media contains a provision stating that social media is acceptable if "permitted because of a protected legal right," this is not enough to prevent the social media rule from being unlawful. The ALJ held that the rule was lawful only because "the first item listed in the provision clearly states that social media is acceptable when 'permitted because of a protected legal right.'" (Decision, p. 22:13-15). Accordingly, the ALJ acknowledged that the rule prohibited activity protected under Section 7 of the NLRA. Further, an employee would have no way of knowing what his or her protected legal rights are, and hence would have no way of knowing what social media activity is permitted and what social media activity is not permitted.

The ALJ's holding that the provision stating that social media use is acceptable when "permitted because of a protected legal right" saves an otherwise unlawful rule that directly contravenes NLRB decisions, which have explicitly held that a rule that prohibits activity protected under Section 7 cannot be saved by a provision stating that the rule does not apply to interfere with employees' protected legal rights. *See Tower Industries*, 349 NLRB at 1084; *Trailmobile*, 221 NLRB at 1089; *Fasco Indus.* 412 F.2d at 590. Accordingly, Claimants request that the Board find this provision unlawful in that it has a reasonable tendency to interfere with Section 7 rights.

### 3. The ALJ Incorrectly Holds at Page 23 of the Decision that the No-Recording Rule Does Not Violate Section 8 of the NLRA

The Updated Employee Handbook limits recording devices, only allowing employees to use recording devices if:

1. All parties that may be recorded have been informed in advance of the risk of being recorded;
2. All such parties affirmatively consent to the video/photo/audio recording; and
3. The Recording Device is in plain view of such-parties at all times.

(Decision, p. 22:26-40). In evaluating this provision, the ALJ held that "the no-recording rules in this case have a comparatively slight impact on Section 7 rights" and that "[e]ven in the absence of compelling evidence akin to that in *Boeing*, however, I find, based on the Board's instruction in *Boeing* that no-camera rules are generally considered lawful, that the Respondent's rule in this case is lawful." (Decision, p. 23:11-12, 19:22).

Although the Board held in *Boeing* that no-camera rules are generally Category 1 Rules, the Board did not go so far as to say that no-camera rules presumptively pass muster and are acceptable limitations on employee activity. In *Boeing*, even after deciding that the particular rule in question was a Category 1 rule, the Board engaged in a balancing analysis and held only after conducting that analysis that "any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance." 365 NLRB No. 154, at 19.

In evaluating Boeing's interest in maintaining a no-camera rule, the NLRB noted:

> The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of information housed therein is critical not only for Boeing's success as a business–particularly its eligibility to continue serving as a contractor to the federal government—but also for national security.

365 NLRB No. 154, at 1. Testimony from Boeing personnel similarly focused on the need for the no-camera rule and the rule's intention of complying with federal mandates and protecting national security. *Id.* at 5-6. The no-camera rule also was intended to prevent the disclosure of Boeing's proprietary information. *Id.* at 6. Although the rule had a purpose of protecting employee's personally identifiable information and employee privacy, it also had the purpose of protecting employee information from being used by unauthorized persons to gain entry onto Boeing property. *Id.* at 6.

In contrast, the ALJ here focused only on the impact on Section 7 rights and found only that "[s]ome heightened security requirements would seem consistent with the business of pawn shops, including the need to protect client financial and collateral information." (Decision, p. 23:17-19). In fact, the ALJ here explicitly stated that there was an "absence of compelling evidence," relying only on "the Board's instruction in *Boeing* that no-camera rules are generally considered lawful." (Decision, p. 19-22). Here, there was *no* testimony regarding Respondent's justification rule that the General Counsel could even attempt to rebut. In Respondent's briefing, the evidence in support of the no-camera rule was comprised of a statement that the industry is "highly-regulated and highly-competitive" and that the "risks, including but not limited to, employees sharing photographs of property and valuables on the premises, certainly overrides [sic] the individual interests of employees under these circumstances" (Respondent's Post-Hearing Brief, filed 10/2/2017, at p. 26), and an incorrect statement that "the policy about recording devices is simply a reflection of applicable law, and does not impact Section 7 rights" (Supplemental Brief of Respondents, filed 2/6/2018, at pp. 11-12).

An analysis of a Category 1 Rule, even if the rule presumptively valid, requires a finding that "the potential adverse impact on protected rights is outweighed by justifications associated

with the rule." 365 NLRB No. 154, at pp. 3-4. The analysis should not end with the finding, as here, that "[t]he record does not establish that the no-recording rules in this case would have any more of an impact on Section 7 rights than the no-camera rule in *Boeing*, above," (Decision, p. 23:9-10). The ALJ here found only that "the no-recording rules in this case have a relatively slight impact on Section 7 rights" and that "[s]ome heightened security requirements would seem consistent with the business of pawn shops, including the need to protect client financial and collateral information." (Decision, p. 23:17-19). However, the ALJ did *not* engage in any apparent way in a balancing test of the employer's justification as compared to the employee's rights. Although Category 1 rules are presumptively lawful, an ALJ must still determine that "the potential adverse impact on protected rights is outweighed by justification associated with the rule." *Boeing*, 365 NLRB No. 154 at 3-4. Respondent must present evidence to demonstrate that its justifications outweigh the potential adverse impact on Claimants' rights under the NLRA. Respondent here failed to do so. Accordingly, Claimants request that the Board find that the no-recording rule here violates Section 8 of the NLRA.

## CONCLUSION

Claimants take exception to the ALJ's findings that: (1) the outside of work behavior rule in the Updated Employee Handbook does not violate Section 8 of the NLRA; (2) the social media use rule in the Updated Employee Handbook does not violate Section 8 of the NLRA; and (3) the no-recording devices rule does not violate Section 8 of the NLRA. Because the outside of work rule and the social media use rule prohibit activity protected by Section 7 of the NLRA, Respondent's use of a disclaimer that the rules do not apply to protected legal activity is insufficient to make the rule lawful. Finally, Respondent failed to present testimony to justify its no recording devices rule. Therefore, the ALJ was left without sufficient evidence to determine

that Respondent's justification for the rule outweighed Claimants' rights. Accordingly, Claimants request that the Board find that the above rules were unlawful and request that the Board uphold the ALJ's decision in all other aspects.

Respectfully Submitted,
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Dated: January 31, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2019, I electronically filed the foregoing document using the NLRB's E-Service System, which will provide notice to all parties' legal counsel of record that have been registered for e-service.

In addition, I also served another copy of the foregoing document by email to the following legal counsel for all parties:

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Respectfully submitted,
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